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7 **IN THE UNITED STATES DISTRICT COURT**  
8 **FOR THE EASTERN DISTRICT OF CALIFORNIA**  
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10 JULIUS JONES,

No. CIV S-04-0950-LKK-CMK-P

11 Petitioner,

12 vs.

FINDINGS AND RECOMMENDATIONS

13 DAVID RUNNELS, et al.,

14 Respondents.  
15 \_\_\_\_\_/

16 Petitioner, a state prisoner proceeding with counsel, brings this petition for a writ  
17 of habeas corpus pursuant to 28 U.S.C. § 2254. Pending before the court is petitioner's motion  
18 for stay of habeas proceedings pending exhaustion in state court of unexhausted claims (Doc. 40)  
19 filed March 13, 2007. Respondent filed an opposition to the motion, and both parties have filed  
20 further briefs as requested by the court.

21 Petitioner's original petition, filed on May 14, 2004, contains three claims: (1) the  
22 trial court erred in instructing the jury regarding specific intent to use force or fear; (2) the trial  
23 court erred in allowing petitioner to be impeached by his prior convictions; and (3) the trial court  
24 improperly used petitioner's priors for the purpose of three strikes enhancement. Petitioner now  
25 seeks an order by this court to stay these proceedings and hold this case in abeyance while he  
26 returns to state court to exhaust two new claims, never before presented to the state court. He

1 then will return to this court and amend his petition to add these two new claims, namely: (1) the  
2 denial of effective assistance of counsel for failing to have petitioner's blood quantitatively tested  
3 for cocaine metabolites; and (2) the denial of effective assistance of counsel for failing to contact  
4 or interview the individuals completing the survey in the parking lot.<sup>1</sup>

#### 5 STAY AND ABEYANCE

6 There are two approaches for analyzing a stay-and-abeyance motion, depending  
7 on whether the petition is mixed or fully exhausted. See Jackson v. Roe, 425 F.3d 654, 661 (9th  
8 Cir. 2005). If the petitioner seeks a stay-and-abeyance order as to a mixed petition containing  
9 both exhausted and unexhausted claims, the request is analyzed under the standard announced by  
10 the Supreme Court in Rhines v. Weber, 544 U.S. 269 (2005). See Jackson, 425 F.3d at 661. If,  
11 however, the petition currently on file is fully exhausted, and what petitioner seeks is a stay-and-  
12 abeyance order to exhaust claims not raised in the current federal petition, the approach set out in  
13 Kelly v. Small, 315 F.3d 1063 (9th Cir. 2003), overruled on other grounds by Robbins v. Carey,  
14 481 F.3d 1143 (9th Cir. 2007), applies. See Jackson, 425 F.3d at 661.

15 Under Rhines, as a threshold condition for this court to exercise its discretion to  
16 issue a stay-and-abeyance order, the court must determine that there was good cause for failing to  
17 exhaust his claims before raising them in this case. See Rhines v. Weber, 544 U.S. at 277. If  
18 there is good cause for petitioner's failure to exhaust, it may be an abuse of discretion to deny  
19 stay and abeyance where there is no indication of intentional dilatory litigation tactics. See id. at  
20 278. Stay and abeyance is not appropriate where the unexhausted claim is plainly meritless. See  
21 id. at 277.

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24 <sup>1</sup> Petitioner has attached as an exhibit to his motion for stay and abeyance a copy of  
25 his proposed amended petition. In this proposed amended petition, he specifically states he is  
26 abandoning his third exhausted claim raised in his original petition. Because this amended  
petition is attached as an exhibit to his motion, and has not been filed, this action proceeds on  
petitioner's original petition, which contains only exhausted claims.

1 Under Kelly, the district court is required to “. . . consider the option of holding  
2 the exhausted petition in abeyance so that the petitioner would be able to exhaust his claims in  
3 state court before attempting to amend his federal petition to include the newly exhausted  
4 claims.” Jackson, 425 F.3d at 661 (citing Kelly, 315 F.3d at 1070). Whether to exercise this  
5 option is within the discretion of the district court. See Kelly, 315 F.3d at 1070. However, the  
6 Ninth Circuit has recognized the “. . . clear appropriateness of a stay when valid claims would  
7 otherwise be forfeited.” Id. Moreover, a stay under such circumstances promotes comity by  
8 deferring the exercise of federal jurisdiction until after the state court has ruled. See id.

9 Regardless of which approach is used, a stay is only appropriate where petitioner  
10 has demonstrated the unexhausted claims are valid, not “plainly meritless,” and that he is  
11 diligently pursuing his state court remedies with respect to these claims. See Jackson, 425 F.3d  
12 at 661; Kelly, 315 F.2d at 1070.

### 13 STATUTE OF LIMITATIONS

14 Federal habeas corpus petitions must be filed within one year from the later of: (1)  
15 the date the state court judgment became final; (2) the date on which an impediment to filing  
16 created by state action is removed; (3) the date on which a constitutional right is newly-  
17 recognized and made retroactive on collateral review; or (4) the date on which the factual  
18 predicate of the claim could have been discovered through the exercise of due diligence. See 28  
19 U.S.C. § 2244(d). Typically, the statute of limitations will begin to run when the state court  
20 judgment becomes final by the conclusion of direct review or expiration of the time to seek direct  
21 review. See 28 U.S.C. § 2244(d)(1).

22 Where a petition for review by the California Supreme Court is filed and no  
23 petition for certiorari is filed in the United States Supreme Court, the one-year limitations period  
24 begins running the day after expiration of the 90-day time within which to seek review by the  
25 U.S. Supreme Court. See Patterson v. Stewart, 251 F.3d 1243, 1246 (9th Cir. 2001). Where no  
26 petition for review by the California Supreme Court is filed, the conviction becomes final 40

1 days following the Court of Appeal's decision, and the limitations period begins running the  
2 following day. See Smith v. Duncan, 297 F.3d 809 (9th Cir. 2002). If no appeal is filed in the  
3 Court of Appeal, the conviction becomes final 60 days after conclusion of proceedings in the  
4 state trial court, and the limitations period begins running the following day.

5           The limitations period is tolled, however, for the time a properly filed application  
6 for post-conviction relief is pending in the state court. See 28 U.S.C. § 2244(d)(2). To be  
7 "properly filed," the application must be authorized by, and in compliance with, state law. See  
8 Artuz v. Bennett, 531 U.S. 4 (2000); see also Pace v. DiGuglielmo, 544 U.S. 408 (2005) (holding  
9 that, regardless of whether there are exceptions to a state's timeliness bar, time limits for filing a  
10 state post-conviction petition are filing conditions and the failure to comply with those time  
11 limits precludes a finding that the state petition is properly filed). A state court application for  
12 post-conviction relief is "pending" during all the time the petitioner is attempting, through proper  
13 use of state court procedures, to present his claims. See Nino v. Galaza, 183 F.3d 1003, 1006  
14 (9th Cir. 1999). It is not, however, considered "pending" after the state post-conviction process  
15 is concluded. See Lawrence v. Florida, \_\_\_ U.S. \_\_\_, 127 S. Ct. 1079 (2007) (holding that  
16 federal habeas petition not tolled for time during which certiorari petition to the Supreme Court  
17 was pending). Where the petitioner unreasonably delays between state court applications,  
18 however, there is no tolling for that period of time. See Carey v. Saffold, 536 U.S. 214 (2002).  
19 If the state court does not explicitly deny a post-conviction application as untimely, the federal  
20 court must independently determine whether there was undue delay. See id. at 226-27.

21           There is no tolling for the interval of time between post-conviction applications  
22 where the petitioner is not moving to the next higher appellate level of review. See Nino, 183  
23 F.3d at 1006-07; see also Dils v. Small, 260 F.3d 984, 986 (9th Cir. 2001). There is also no  
24 tolling for the period between different sets of post-conviction applications. See Biggs v.  
25 Duncan, 339 F.3d 1045 (9th Cir. 2003). Finally, the period between the conclusion of direct  
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1 review and the filing of a state post-conviction application does not toll the limitations period.

2 See Nino, 1983 F.3d at 1006-07.

3 DISCUSSION

4 In this case, petitioner was convicted on March 13, 2000. His conviction was  
5 affirmed by the California Court of Appeal on October 24, 2001. The California Supreme Court  
6 denied his petition for review on January 16, 2002. The time to file a petition for certiorari with  
7 the United States Supreme Court ended on April 16, 2002. Petitioner then filed his first writ of  
8 habeas corpus with the Sacramento Superior Court on April 15, 2003, just shy of one year later.  
9 Petitioner's last state court case was decided on April 28, 2004. The instant federal writ of  
10 habeas corpus was filed on May 14, 2004.

11 As respondent states, even assuming, arguendo, that all internal tolling intervals  
12 between the state filings were found to be reasonable, the statute of limitations has already run on  
13 petitioner's ineffective assistance of counsel claims. Under the AEDPA's statute of limitations,  
14 petitioner's federal petition must be filed within one year of his conviction being final, or within  
15 one year of discovery of the facts to support the claim, plus the time allowed for tolling.

16 Petitioner's conviction became final on April 16, 2002.<sup>2</sup> Petitioner then waited almost an entire  
17 year – until April 15, 2003 – to file his first habeas petition with the state courts. Even assuming  
18 he is entitled to tolling during the pendency of his state cases through April 28, 2004, petitioner's  
19 time to file a federal writ of habeas corpus had expired by the date he filed the instant action on  
20 May 14, 2004. By the time he first filed in state court, only 1 day remained on the statute of

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23 <sup>2</sup> Petitioner cannot claim that the statute of limitations as to his ineffective  
24 assistance of counsel claims should begin to run on a later date because claims related to  
25 ineffective assistance of counsel are not the types of claims that are discovered at a later date. At  
26 the latest, petitioner was aware of the facts supporting an ineffective assistance of counsel claim  
at the time of his conviction. He does not argue that he learned about the facts giving rise to  
these claims at a later date, nor can he.

1 limitations. Thus, petitioner would have had to file the instant petition on April 28, 2004, to be  
2 timely. Instead, petitioner waited until May 14, 2004 – over two weeks past the expiration of the  
3 statute of limitations.

4           Moreover, even if the new claims would have been timely had they been included  
5 with the original petition filed in this court on May 14, 2004, because they are to be raised in an  
6 amended petition, the amended petition would have to relate back to the date the original petition  
7 was filed for the new claims to be timely. Under Federal Rule of Civil Procedure 15(c)(2), which  
8 is applicable in habeas proceedings, amendments made after the statute of limitations has run  
9 relate back to the date the original pleading was filed if the original and amended pleadings arise  
10 out of the same conduct, transaction, or occurrence. Relation back requires a common core of  
11 operative facts uniting the original and new claims. See Mayle v. Felix, 545 U.S. 644, 659  
12 (2005). In the habeas context, the Ninth Circuit had held that the words “same conduct,  
13 transaction, or occurrence” meant that an amended habeas petition would relate back so long as  
14 any new claims stems from the petitioner’s trial, conviction, or sentence. See id. at 656. The  
15 Supreme Court noted that, under this formulation, “. . . virtually any new claim introduced in an  
16 amended petition will relate back, for federal habeas claims, by their very nature, challenge the  
17 constitutionality of a conviction or sentence. . . .” Id. at 656-67. The majority of circuits,  
18 adopted a narrow rule in light of AEDPA’s one-year statute of limitations. See id. at 657. The  
19 narrow rule allows relation back only when “. . . the claims added by amendment arise from the  
20 same core facts as the timely claims and not when the new claims depend upon events separate in  
21 ‘both time and type’ from the originally raised claims.” Id.

22           An amended habeas petition does not relate back when it asserts a new ground for  
23 relief supported by facts that differ in both time and type from those the original petition set  
24 forth. See id. at 657. In determining whether the amended claim and original claim arose from a  
25 common core of operative facts, the Supreme Court in Mayle compared the facts required to  
26 answer the dispositive questions presented as to each claim. See id. at 657-68.

1 In this case, petitioner's original claims involve errors by the trial court in  
2 instructing the jury and allowing use of petitioner's priors to impeach petitioner. Neither of these  
3 claims, nor his third claim for the use of his priors as sentencing enhancements, had anything to  
4 do with the actions of trial counsel, nor do they share any of the same basic facts. Trial counsel's  
5 failure to have petitioner's blood tested for cocaine metabolites and to interview potential  
6 witnesses are completely unrelated to the actions of the trial court. Therefore, petitioner is not  
7 able to relate these new claims back to the filing date of his federal petition, and these new claims  
8 would be barred by the AEDPA's one-year statute of limitations, even if the new claims would  
9 have been timely if filed by the original filing date.

10 Finally, petitioner claims that there is good cause for the delay in presenting the  
11 new claims to the state court because he attempted to have his previously appointed habeas  
12 counsel amend his complaint to include these claims back in July 2004, shortly after counsel was  
13 appointed. However, as respondent notes, petitioner's statute of limitations time ran prior to the  
14 date of his letter to counsel informing counsel about the possible ineffective assistance of counsel  
15 claim. It appears that petitioner was in fact aware of this possible claim at the time he filed his  
16 federal petition, and did nothing in an attempt to exhaust the claims with the state court.  
17 Therefore, the undersigned does not find that petitioner had good cause for his failure to exhaust.

18 Based on the foregoing, the undersigned recommends that petitioner's motion for  
19 stay and abeyance should be denied.

20 These findings and recommendations are submitted to the United States District  
21 Judge assigned to the case, pursuant to the provisions of 28 U.S.C. § 636(b)(1). Within 30 days  
22 after being served with these findings and recommendations, any party may file written  
23 objections with the court. The document should be captioned "Objections to Magistrate Judge's

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Findings and Recommendations.” Failure to file objections within the specified time may waive the right to appeal. See Martinez v. Ylst, 951 F.2d 1153 (9th Cir. 1991).

DATED: December 18, 2007

  
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**CRAIG M. KELLISON**  
UNITED STATES MAGISTRATE JUDGE